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IN THE

Supreme Court of the United States

October Term, 1957

No. 420

WILLIE C. SAWYER, ET AL.

CHARLES E. BURGESS, ET AL.

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Willie C. Sawyer, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on the third day of April, 1957, in the above entitled cause (No.'s 209-55 and 219-56, below, consolidated for trial and decision).

OPINIONS BELOW

The opinion of the Court of Claims in the present case is printed in the Appendix hereto, at page 16, and is unreported. Also printed in the Appendix (p. 18) is the opinion of the Court of Claims in *Gaetke* v. *United States.*

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1957. (R. 59). A motion for rehearing and for

modification of the findings and judgment was timely filed on April 11, 1957, (R. 61) and denied by the Court on June 5, 1957. (R. 65). The jurisdiction of this Court is invoked pursuant to Title 28, Section 1255, U.S.C.

QUESTIONS PRESENTED

Section 201 of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, provides that "Officers and employees to whom this title applies *shall*, in addition to their basic compensation, be compensated for *all hours of employment*, officially ordered or approved in excess of 40 hours in any administrative work week . . .". (Italics supplied). Section 301 of the same Act provides premium compensation for *duty* performed between the hours of 6 o'clock P.M. and 6 o'clock A.M. Petitioners have been employed as guard-firefighters at a Veterans Administration hospital and respondent agrees that these sections of the statute are applicable to them.

1. Under the provisions of the statute cited above, in the absence of any contract to the contrary, are petitioners entitled to pay for time in excess of 40 hours per week during which they were confined by official order to their posts on the hospital grounds, continuously subject to call for duty and in fact called when needed, but allowed to eat and, at irregular hours, to obtain some sleep which was inadequate in quality by reason of facilities and circumstances inconsistent with normal sleep?

2. Under the conditions outlined in Question 1 above, are petitioners entitled to night pay differential for time compulsorily spent on the respondent's premises?

3. The instant case having been tried solely on the issue of liability, apart from any issue of damages, was it error for the Court of Claims to dismiss the petition in its entirety upon findings establishing that, at the very least, *some* work was performed by petitioners during their so-called rest periods?

STATUTES INVOLVED *

The statute involved is the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended which provides in pertinent part as follows:

> "Sec. 201. 'Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows: * * *' (5 U.S.C. 911)
>
> "Sec. 301. 'Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which including overtime, falls between the hours of 6 o'clock p.m. and 6 o'clock a.m., shall for duty between such hours . . . be paid compensation at the rate of 10 per centum in excess of his basic rate of compensation for duty between other hours . . .'" (5 U.S.C. 921)

STATEMENT OF THE CASE

For various periods since May 25, 1949, petitioners, in the classified service of the United States, have been employed by respondent in the combined capacity of guards

* Finding 8.b. (R. 36) sets forth a regulation of the Veterans Administration bearing date of August 26, 1949 setting forth a so-called 2/3 rule in terms applicable only to firemen. Subsection c.(3) thereof specifically exempts guards from the regulation governing fire protection personnel. Subsection 3(d) of the regulation states "where certain employees are engaged on continuous activities such as *guards*, the officials having authority to fix or change tours of duty may designate any two days in the administrative work week as no-work days, in lieu of Sunday and Saturday. However, the administrative work week shall coincide with the calendar week and include a basic work week of five 8-hour days during the calendar week . . ." Finding 14.a. specifically states "only a minor part of their (petitioners') weekly total of hours was spent in actually fighting fires or in training in fire fighting techniques". The Commissioner concluded that these regulations are inapplicable to petitioners. (R. 22-3). The Court presumably agreed, making no mention of them in its opinion.

and firefighters at the Oteen Veterans Hospital, a facility of the Veterans Administration, their duties as guards predominating over their duties as firefighters. (R. 40). Prior to 1947, the positions of guard and firefighter were separate ones at the Oteen Hospital. The consolidation of functions was carried out in the ensuing two years. It was accompanied by a reduction in force but not by a corresponding increase in pay to the individual whose duties were enlarged. (R. 34). During the entire period covered by this claim each of the petitioners, except when on leave status, had tours of duty totalling 60 hours each week, consisting of two 24-hour tours and one 12-hour tour, the former being from 8 A.M. to the following 8 A.M. and the latter from 8 P.M. to the following 8 A.M. (R. 53). Each daily tour of duty consisted of one part during which petitioners performed active, routine assignments, and of another part during which they were on a standby basis, remaining continuously subject to call and performing any of a wide variety of tasks when called. No definite hours were set aside as sleeping or eating time. The exigencies of the duties permitting, petitioners were free to lie down on their cots and have some sleep between 12-1 o'clock A.M. and 6-7 o'clock A.M., when on the 24-hour tour of duty, and between 8 o'clock P.M. and 11 o'clock P.M. when on the 12-hour tour of duty. (R. 54-6). Thus, petitioners had available a maximum of 6 hours for sleep during each of the two 24-hour tours of duty, and a maximum of 3 hours for sleep during each of the 12-hour tours of duty. Petitioners had available 7 meal periods during their weekly tours of duty, each meal lasting 20 to 30 minutes, or a maximum of 3½ hours per week. (R. 54). These, together with not more than 15 hours available each week for sleep, totalled 18½ hours, leaving a minimum of 41½ hours out of the 60-hour weekly tour of duty spent in the performance of routine assignments, or fully awake in an active standby basis.

In addition to the 1½ hours of active standby time, over and above the regular 40 hours of work per week, the findings recite that "plaintiffs were available for call during their meal periods but the evidence does not establish that interruptions were frequent", (R. 54) and "while resting plaintiffs were available for call in the event of fire or other emergency but the record indicates that the frequency of such interruptions was not significant". (R. 54-5).

Following a lengthy and detailed resume of the manifold activities of petitioners comprised within their official duties, the last two sentences of Finding 14.a. state: "If any of the foregoing emergencies arose while plaintiffs were enjoying their rest period, and the men on duty were inadequate to cope with the problem or unavailable, the plaintiffs were then required to interrupt their rest to discharge their duties. It is not believed that these interruptions were frequent, *but they occurred with sufficient frequency to make necessary the presence of plaintiffs to cope with them.*" (Italics supplied). (R. 57).

Finding 14.e. recites that petitioners' so-called rest period was further encroached by a "small measure" of doubling over. This practice took the form of the men on the long shift continuing active work after midnight if a man on the 12-hour shift was unable to report for duty, or for those on the short shift substituting for an absent member of the long shift crew during their rest period from 8 o'clock P.M. to midnight. Finding 16 states that "On rare occasions they (petitioners) would have to attend disciplinary board hearings to testify during off duty hours." (R. 58)

Finding 17 shows that "plaintiffs . . . received no overtime pay or compensatory time off *for performance of duty* or time compulsorily spent on the reservation in excess of 40 hours weekly". (Italics supplied). (R. 58).

The sleeping facilities at Oteen consisted of six cots in a dormitory on the second floor of the fire station. The bachelor officers at Oteen had quarters on the same floor of the fire station. There were some interferences with sound sleep such as the noises made by the telephone in the dormitory, infrequent emergency calls to official duties, repair and maintenance of vehicles in the fire house and garage below and arrival and departure of delivery trucks and workers as early at 4 A.M. (R. 54-55). The resulting rest was of a quality inferior to that which one would normally enjoy at home. At one of the branches of the Oteen Hospital the dormitory was on the ground floor of the fire station adjacent to the fire fighting equipment and vehicle garage; and during portions of 1949 and 1950 a two-way public address system was hooked up near the dormitory and the nurse or aide on duty in the detention ward of the hospital would use the system to call petitioners periodically from 6 P.M. to 6 A.M. to check on their availability. If the telephone system broke down, a light would go on and a bell would ring in the dormitory. (R. 56).

Petitioners were married and living with their families. Their duty schedules caused a departure from the routine of family life and social activities normal to them had their occupations involved more regular hours. While on duty they were permitted to receive telephone calls only through the engineer's office, and could make outgoing calls only from a pay telephone which, at one branch of the hospital, was *two hundred* yards from the fire station. (R. 58).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

In the companion cases of *Armour Company* v. *Wantock*, 323 U.S. 126 and *Skidmore* v. *Swift and Company*, 323 U.S. 134, this Court firmly repudiated the notion that, within the meaning of the Fair Labor Standards Act of 1938, employment is coterminous with actual work, labor or physical exertion. Thus, in the *Armour* case, at page 133, this Court stated: "Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a standby capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."

While, petitioners' request notwithstanding, the Court below failed to make an express finding upon this crucial question of whether the additional 20 hours per week over and above the normal 40 hour administrative work week, was spent predominantly for the benefit of the respondent or for the petitioners, there can be no doubt, upon the basis of the findings in the record that these additional hours were spent by the petitioners upon the premises of the respondent predominantly, if not exclusively, for respondent's benefit. This inference follows, as a matter of compulsion from Findings 10.e. (R. 54-5), 15., 16. and 17. (R. 58-9), wherein it is found that petitioners', rest was of a quality inferior to that which one

would normally enjoy at home; that petitioners were restricted to the reservation during their tours of duty, subject to disciplinary action for unauthorized absences; that they could not leave their place of employment even at the expiration of their tours of duty until they were relieved; that petitioners were married men, and that their duty schedules affected them disadvantageously in their social and family relationships; and that petitioners received no pay or compensatory time off for performance of *duty* or time compulsorily spent on the reservation in excess of 40 hours weekly.

In *Skidmore* v. *Swift and Company*, 323 U.S. 134, as well as in the *Armour* case, *supra*, this Court recognized that standby time is compensable time, the sole exception being time spent by the employee for eating, sleeping, or other purposes of his own unrelated to the purpose of the employment. The rationale for this exception lies, as stated by this Court in the *Skidmore* case, page 139, in that ". . . these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued *adequately* and *comfortably* in the required circumstances . . ." (Italics supplied). As pointed out heretofore (*supra*, p. 4), these petitioners spent not 40, but a minimum of 41½ hours each week in the performance of routine assignments, or on a standby basis, no matter how described. It is clear that under the *Armour* and *Skidmore* cases this excess of 1½ hours per week is compensable time. Furthermore, in view of the findings summarized in the Statement of Facts, *supra*, the conclusion is inescapable that the rest period of petitioners was invaded by the respondent for the purpose of demanding that they interrupt their rest or meal in the performance of emergency, or other duty. As indicated, the trial of this case was limited to the issue of liability, the question of damages, if any, having been specifically reserved, by stipulation, for subsequent

proceedings. It is this fact which accounts for the absence of specific findings upon this particular.* It is clear, however, that the aggregate of these interruptions cannot be dismissed as negligible, and the description of such interruptions as not significant in the findings is clearly unwarranted in view of the *specific facts* contained in the findings adverted to in the Statement of Facts, *supra*.

Finally, a perusal of pertinent findings indicates that such mealtime and rest periods as petitioners had were so unsatisfactory in character as to make it impossible to regard them as "private pursuits" of petitioners. Finding 10.d. (R. 54) recognizes that petitioners were available for call during their meal periods and, at least by indirection, recognizes *some* interference with this activity when it states that the evidence does not establish that interruptions were "frequent". Findings 10.e. (R. 54), 12. (R. 55) and 14.a. (R. 56) describe the institutional character of the sleeping quarters available to petitioners and recites that "there are some interferences with sound sleep, such as the noises made by the telephone in the dormitory, infrequent emergency calls to official duty, repairs and maintenance of vehicles in the fire house and garage below, and arrival and departure of delivery trucks and early workers as early as 4 A.M.; that the resulting rest was of a quality inferior to that which one would normally enjoy at home; that public address systems and the ringing of bells was a source of substantial interference with sound sleep, and that interruptions to sleep occurred "with sufficient frequency to make necessary the presence of plaintiffs (petitioners) to cope with them." (R. 57).

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* Petitioners petitioned the Court of Claims for a rehearing to accomplish this very purpose, but their petition was denied. (R. 65).

The test laid down by this Court in the *Skidmore* case, *supra*, that to justify the elimination of eating and sleeping time from the compensable standby time, it need be shown that these activities could be "pursued adequately and comfortably in the required circumstances" is plainly denied application by the Court below. cf. also *Bountiful Brick Company* v. *Giles*, 276 U.S. 154, 158; *Tennessee Coal, Iron and Ry. Company* v. *Muscoda Local No. 123*, 321 U.S. 590.

II. THE DECISION OF THE COURT BELOW IN THE INSTANT CASE CONFLICTS WITH PERTINENT DECISIONS OF CIRCUIT COURTS OF APPEAL.

The decision and reasoning of the 8th Circuit Court of Appeals in the case of *Glenn L. Martin Nebraska Company* v. *Culkin* (1952) 197 F.(2d) 981, cert. den., 344 U.S. 866, is in conflict with the decision of the Court of Claims in the present case. The trend of reasoning in that case is indicated in the following excerpt from its opinion: "Much emphasis is placed by defendant upon the fact that only in comparatively few instances did the evidence show that guards or firemen were required to answer calls for fires or to quell disturbances during the 30 minute period in question. But the question was not so much whether the guards and firemen were actually regularly called upon to put down overt acts of violence, sabotage, disturbances, or to put out fires during the 30 minute period, is it was whether they were performing their regular duties during that period and were then substantially performing the duties assigned to them by their employer *and were not free to follow pursuits of a purely private nature*". (Italics supplied).

It is respectfully submitted that the decision in the case at bar is likewise in conflict with the applicable principles enunciated in the cases of *Beall* v. *U. S.*, 182

F.(2d) 565 (C.C.A. 6, 1950), cert. den., 340 U.S. 852, and *Mitchel* v. *Greinetz* (C.C.A. 10, 1956), 235 F.(2d) 621.

III. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

(a) The case at bar is one of a large number of cases now pending in the Court of Claims, in which groups of employees, such as the petitioners here, claim pay for time on duty or work performed by them, or both, in excess of 40 hours per week. Among such cases are:

William Ahearn, et al. v. *United States*, No. 332-55 (Naval Station at Newport, Rhode Island)
Merlin Armstrong, et al. v. *United States*, No. 145-56 (Air Force Base in Oklahoma)
Charles A. Andrews, et al. v. *United States*, No. 481-55 (Naval Station, Norfolk, Virginia)
Amando Acevedo, et al. v. *United States*, No. 258-56 (Naval Station at Key West, Florida)
Ray W. Booker, et al. v. *United States*, No. 14-57 (Veterans Administration, Roanoke, Virginia)
Joseph H. Bell, et al. v. *United States*, No. 289-57 (Military Academy, West Point, N.Y.)
Harold Eugene Beanblossom, et al. v. *United States*, No. 175-57 (Veterans Administration, Long Beach, California)
Albert M. Boatman, et al. v. *United States*, No. 382-57 (Naval Station, China Lake, California)

The decision in all of the foregoing cases hinges upon the proper application of Sections 201 and 301 of the Federal Employees Pay Act of 1945.

(b) The present case is one of a series decided by the Court of Claims which are so inconsistent with each other as to leave the law in a serious state of confusion.

In the month of January, 1955, and prior to the trial of the case at bar, the Court of Claims rendered an opinion in the case of *Cora C. Farley* v. *United States*,

131 Ct. Cl. 776. The *Farley* case was followed by the case of *England, et al.* v. *United States,* 133 Ct. Cl. 768. Invoking the decision of this Court in *Skidmore* v. *Swift and Company,* 323 U.S. 134, the Court of Claims decided that the claimants were entitled to overtime compensation and to night pay differential for 43 hours average by-weekly time during which they necessarily remained in charge of a cottage in a federal reformatory, as correctional officers. The Farley decision was reached even though the evidence showed that at 9:30 P.M., being the beginning of this extra period, the lights in the cottage went out, the doors locked, and claimant expressly permitted to go to sleep in a private room used by her exclusively, and not required to engage in active duty except on rare occasions. Throughout the opinion rendered in the *Farley* case the Court alludes to the element of *duty* to remain on the defendant's premises, rather than to the frequency and degree of service actually rendered, as determinative of the decision that the extra hours thus spent by her were "hours of employment" within the meaning of section 201 of the Pay Act of 1945. After referring to some pertinent findings, the Court stated: "In these circumstances, we cannot escape the conclusion that the correctional officer was on *duty.* The order itself stipulated that the officer should 'remain on *duty*'. Her freedom of choice to follow her own habits was restricted for the benefit of the defendant . . ." (Italics supplied). The *England* case followed closely the reasoning of the *Farley* case.

The trial commissioner of the Court of Claims, to whom the instant case was referred with directions to make findings of fact and to make recommendations as to the legal conclusions, expressed the view (R. 24) that the case at bar is identical, in legal principle, with the *Farley* case, in effect urging that the Court of Claims repudiate its earlier decision in the *Farley* case.

However, in the *Per Curiam* opinion filed in the present case, the Court of Claims rests its decision on the authority of the case of *Harold Gaetke, et al.* v. *United States* (decided November 7, 1956), Appendix p. 18, and proceeds to state that, "on the authority of our opinion in the Gaetke case . . . we adopt and approve the trial commissioner's findings of fact and the conclusion of law which he has recommended. The petitions are dismissed". To "adopt" and "approve" findings of *fact* on the authority of any *opinion* previously rendered in connection with another case with which petitioners in the case at bar had no connection entailed departure from proper procedure necessarily leading to unsound reasoning and erroneous decision.

Several formal aspects of the *Gaetke* case clearly distinguish it from the case at bar. Gaetke's claim arose under the 1934 Pay Act which prescribed overtime payments for hours of "labor" (Italics by the Court in its opinion in the *Gaetke* case), in contrast to the 1945 Pay Act which provides for overtime payment for excess hours of *employment*. The 1945 Pay Act, being the first comprehensive federal legislation on the subject, it must be presumed that the change of terminology was deliberate on the part of Congress, and intended to substitute a more elastic conception for one which is of a more restricted nature. Gaetke was a Wage Board employee, whereas petitioners herein are General Schedule employees in the classified service. It is reasonable to argue for a less rigid interpretation of the term employment as applied to the former than would be the case with the latter.*

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* Distinctions between these groups of employees as regards overtime compensation, and for other purposes, are evident in the following laws: The Lloyd-LaFollette Act of August 24, 1912, 57 Stat. 714, Chapter 508, Section 4(b) 5 U.S.C., Section 189(a); 43 Stat. 1300, Chapter 549, Section 1, 44 U.S.C., Section 75.

Furthermore, Gaetke chose to restrict his potential rights by a *contract* with the Alaska Railroad. Such contract, of course, would normally be conclusive of his rights unless, to quote from the opinion of the Court of Claims in the case of *Farley* v. *United States, supra,* such contract was contrary to a "clear statute". In the Gaetke case the Court of Claims in effect decided that the contract was binding because the statute governing that case confers a right to overtime payments only for *labor,* and Gaetke failed to allege that he performed any labor in excess of 40 hours per week. In the case at bar no contract is involved.

But, the reliance of the Court below upon the Gaetke case as a basis for adopting and approving *findings of fact* points to an extraordinary departure from the usual judicial method in that (a) it shows that in fashioning its findings of fact the Court of Claims was guided and motivated by a preconceived notion of the legal conclusion which it considered appropriate to the case, and (b) the decision dismissing the petition evidences a disregard by the Court of Claims of the factual aspect of its own Findings, apparently, on the theory that such facts are not legally relevant. As pointed out in the Statement of the Case, *supra,* pp. 4-5, petitioners herein clearly performed *some* services, and that they did *some* work during their so-called sleeping and eating periods. By contrast, the Court of Claims in its opinion in the *Gaetke* case, Appendix, p. 20, specifically states: "The petition does not allege that these employees put in more than 56 hours a week of labor and standby time for which they were paid . . ." Again, Appendix, at page 20, "since it is not alleged that plaintiffs were deprived of the requisite number of hours for sleeping and eating . . . the 1934 Act has been complied with."

Also, by contrast with the case at bar in which the findings show the unsatisfactory character of the sur-

roundings in which petitioners spent their rest period and the tenuous quality of their sleep no similar evidence is discernible in the Gaetke case.

In the face of these dissimilarities it is difficult to perceive in what way the Gaetke case is related to the case at bar, unless the existing facts were to be treated as utterly insignificant. An attitude like this was specifically repudiated by this Court in the following language used by it in the case of *Skidmore* v. *Swift and Company*, 323 U.S. 134, 140. Speaking of the action of the U. S. District Court in that case, this Court stated: "Its evaluation and inquiry were apparently restricted by the notion that waiting time may not be work, an understanding of the law which we held to be erroneous".

CONCLUSION

For the foregoing reasons, petitioners pray that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

(Decided April 3, 1957)

No. 209-55

WILLIE C. SAWYER, ET AL. v. THE UNITED STATES

No. 210-56

CHARLES E. BURGESS, ET AL. v. THE UNITED STATES

Mr. Irving Wilner for the plaintiffs. *Messrs. Keith L. Seegmiller* and *William J. Houston* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant, *Mr. Thomas J. Lydon* was on the brief.

OPINION

PER CURIAM: This case [1] was referred by the court, pursuant to Rule 45 (c), to C. Murray Bernhardt, a trial commissioner of the court, with directions to make findings of fact, and to make recommendations as to the legal conclusions which the court should reach as a result of

[1] After evidence was closed in the *Sawyer* case, the parties in the *Burgess* case filed a stipulation consolidating the two for trial, since both involved identical facts and common issues of liability. The commissioner ordered the consolidation pursuant to Rule 28 (a) and the cases are reported jointly. At trial the issue of liability was separated from that of damages.

the findings and applicable statutes and legal principles. The report of the commissioner was made before the court's decision in the case of *Harold Gaetke, et al.*, v. *The United States* (decided November 7, 1956).

On the authority of our opinion in the *Gaetke* case, *supra*, we adopt and approve the trial commissioner's findings of fact and the conclusion of law which he has recommended.

The petitions are dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 334-54

(Decided November 7, 1956)

HAROLD GAETKE, ET AL., v. THE UNITED STATES

Mr. Ray R. Murdock for plaintiffs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for defendant. *Miss Cecilia S. Kraeling* was on the brief.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WHITAKER, *Judge,* delivered the opinion of the court:

Plaintiffs were fire fighters employed by the Alaska Railroad under a contract that required their presence at the fire house every other day for the full 24 hours. The contract provided:

> • • • The first sixty (60) hours on the job, less twenty (20) hours for sleeping and eating, will be regarded as the basic 40-hour work week. • • •
>
> The entire period of twenty-four (24) hours on duty, less time allowed for sleep and meals will be used in computing the total number of regularly scheduled hours per week for overtime pay purposes. Two-thirds (2/3) of each hour on the job will represent time in pay status and one-third (1/3) as time out for sleeping and eating. During the twenty-four (24) hours on duty, employees are required to remain at the fire station and respond immediately to emergencies, day or night. During off duty period, employees are not required to remain in the fire hall.

Plaintiffs have been paid for 40 hours a week regular time and for 16 hours overtime. They claim they are

entitled to pay for 44 hours overtime and 40 hours regular time. They are not entitled to this under the contract, but they say they are entitled to it under section 23 of the Act of March 28, 1934 (48 Stat. 522) and under the Federal Employees Pay Act of 1945 (59 Stat. 296). The pertinent part of section 23 of the 1934 Act is the proviso, which reads as follows:

> * * * *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half.

The same provision is contained in the 1945 Act.

Plaintiffs say that where the pay of an office or position is fixed by statute, a government employee is entitled to this pay notwithstanding his agreement to receive a lesser pay. They then say that they were on duty every other day for 24 hours a day, and that, under the statute, they are entitled to compensation for the full 24 hours.

It is agreed that plaintiffs were subject to call at any time during the 24 hours, but it is admitted that they rarely, if ever, actually worked 24 hours in any one day. Ordinarily, during the 24 hours, they labored 8 hours; for another 8 hours they were in a stand-by status, during which they were required to do no labor, but were free to play cards, dominoes, listen to the radio, or do anything they pleased, so long as they stood ready to respond if they were called upon. For these 16 hours they were paid; for a part they were paid straight time, and for the rest, time and a half.

They were not paid for the other 8 hours, because this was supposed to be devoted to sleeping and eating. Under the contract the first 60 hours of a week were supposed to represent the basic 40-hour week, 20 hours being regarded as time devoted to sleeping and eating. If more than 60 hours were required of the employee, two-thirds of it were compensable at time and a half, and one-third was supposed to be spent in eating and

sleeping. Actually, as stated, 56 hours a week of labor and stand-by time was demanded, and they were compensated accordingly.

The petition does not allege that these employees put in more than 56 hours a week of labor and stand-by time, for which they were paid, if the time spent in eating and sleeping is not to be counted as stand-by time. It does not allege that 28 hours a week, for which they claim additional compensation, were not available to them for eating and sleeping. If they were, it is difficult to see how they can claim compensation therefor. An employer does not have to pay an employee for the time he spends in bed or at the dining table.

It may be that after the employee went to bed he was called to fight a fire, but if other time during the week was made available to him for sleeping and eating, so that during the week a total of 28 hours were so available, we are unable to see how the employee had spent more than 56 hours during the week at labor and in a compensable stand-by status. All that the Act requires is that an employee be paid regular time for 40 hours a week, and that he shall be paid time and a half for hours *of labor* in excess of 40 hours. Time spent in eating and sleeping are not spent in labor. Since it is not alleged that plaintiffs were deprived of the requisite number of hours for sleeping and eating, and since it appears that they have been paid for all time spent except in eating and sleeping, it seems to us that the 1934 Act has been complied with.

The contract between the employees and the railroad was a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs.

The Fair Labor Standards Act (52 Stat. 1060), applicable to private industry engaged in interstate commerce, provided for a workweek of 40 hours at regular pay, and time and a half for overtime. Swift & Company employed fire-fighters for the protection of their

plant. From three and one-half to four nights a week they were required to remain at the fire hall after their hours of labor were over. They claimed overtime therefor. The Supreme Court, in its opinion reported in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, did not decide whether they were entitled to be paid for sleeping and eating time, but at page 139 it did refer to the brief *amicus curiae* of the Administrator of the Fair Labor Standards Act as follows:

> The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

Of this statement of the Administrator the court said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In *Winsberg* v. *United States*, 120 C. Cls. 511, we held that a physican employed by the Veterans Administration was not entitled to compensation for the time spent in eating and sleeping, although he was subject to call during those hours. This case arose under the War Overtime Pay Act of 1943 (57 Stat. 75), which provided for a workweek of 40 hours and for time and a half for overtime.

See also *Bowers, et al.* v. *Remington Rand*, 159 F. 2d 114, and *Bell* v. *Porter*, 159 F. 2d 117.

The facts in *Farley* v. *United States*, 131 C. Cls. 776, and *England, et al.* v. *United States*, 133 C. Cls. 768, differ materially from the facts in the case at bar. In those cases plaintiffs regularly performed substantial labor during their sleeping time. In the case at bar it is not alleged that any labor was actually performed during the eight hours allowed for sleeping and eating.

It results that defendant's motion for summary judgment is granted, and plaintiffs' petition is dismised.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.